

Preliminary Draft
FOR ILLUSTRATIVE PURPOSES ONLY
(Based upon policies contained in the 5th staff draft of the Delta Plan)

California Code of Regulations

Title 23. Waters.

Division 6. Delta Stewardship Council.

Chapter 2. Consistency with the Delta Plan.

Article 1. Definitions.

§ 5001. General Definitions.

As used in this division, the terms listed below shall have the meanings noted:

(a) "Adaptive management" shall mean a framework and flexible decision making process for ongoing knowledge acquisition, monitoring, and evaluation leading to continuous improvement in management planning and implementation of a project to achieve specified objectives.

(b) "Agricultural water supplier" shall refer to both "agricultural retail water suppliers" and "agricultural wholesale water suppliers" under the Water Code, but not the Department of Water Resources, and includes:

(1) A water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water;

(2) A water supplier or contractor for water, regardless of the basis of right that distributes or sells water for ultimate resale to customers.

(c) "Best available science" shall be defined as in Chapter 2 of the Delta Plan. Chapter 2 of the Delta Plan is hereby incorporated by reference as if fully set forth herein.

(d) "Coequal goals" shall mean the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

(e) "Delta" shall mean the Sacramento-San Joaquin Delta as defined in Section 12220 and the Suisun Marsh, as defined in Section 29101 of the Public Resources Code.

(f) "Delta Plan" shall mean the comprehensive, long-term management plan for the Delta as adopted by the Delta Stewardship Council in accordance with the Sacramento-San Joaquin Delta Reform Act of 2009.

(g) "Floodplain" shall mean any land area susceptible to being inundated by flood waters from any source, as defined by the FEMA national flood insurance program.

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(h) “Floodway” shall mean the channel of a river or other watercourse and the adjacent land areas that convey flood waters, as defined by California Code of Regulations, Title 23, Division 1, Chapter 1, Article 2, Section 4.

(i) “Inherent objectives” shall mean the following objectives which the Legislature has declared are inherent in the coequal goals for management of the Delta:

(1) Manage the Delta's water and environmental resources and the water resources of the state over the long term.

(2) Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.

(3) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.

(4) Promote statewide water conservation, water use efficiency, and sustainable water use.

(5) Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta.

(6) Improve the water conveyance system and expand statewide water storage.

(7) Reduce risks to people, property, and state interests in the Delta by effective emergency preparedness, appropriate land uses, and investments in flood protection.

(8) Establish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives.

(j) “Setback levee” shall mean a new levee constructed behind an existing levee which allows for removal of a portion of the existing levee and creation of additional floodplain connected to the stream. In the Delta, a “setback levee” may not necessarily result in removal of the existing levee.

(k) “Significant impact” shall mean a change in existing conditions that is directly, indirectly, and/or cumulatively caused by a project and that will significantly affect the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta.

(l) “Urban water supplier” shall refer to both “urban retail water suppliers” and “urban wholesale water suppliers”:

(1) “Urban retail water supplier” shall mean a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annual at retail for municipal purposes.

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(2) "Urban wholesale water supplier" shall mean a water supplier, either publicly or privately owned, that provides more than 3,000 acre-feet of potable water annually at wholesale for municipal purposes.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85057.5, 85059, 85058, 85020, 85054, 85052 and 10608.12, Water Code.

§ 5002. Covered Actions Defined.

(a) "Covered action" shall mean a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

- (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
- (2) Will be carried out, approved, or funded by the state or a local public agency.
- (3) Is covered by one or more provisions of the Delta Plan.
- (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

(b) "Covered action" does not include any of the following:

- (1) A regulatory action of a state agency.
- (2) Routine maintenance and operation of the State Water Project or the federal Central Valley Project.
- (3) Regional transportation plans prepared pursuant to Section 65080 of the Government Code.
- (4) Any plan, program, project, or activity within the secondary zone of the Delta that the applicable metropolitan planning organization under Section 65080 of the Government Code has determined is consistent with either a sustainable communities strategy or an alternative planning strategy that the State Air Resources Board has determined would, if implemented, achieve the greenhouse gas emission reduction targets established by that board pursuant to subparagraph (A) of paragraph (2) of subdivision (b) of Section 65080 of the Government Code. For purposes of this paragraph, "consistent with" means consistent with the use designation, density, building intensity, transportation plan, and applicable policies specified for the area in the sustainable communities strategy or the alternative planning strategy, as applicable, and any infrastructure necessary to support the plan, program, project, or activity.
- (5) Routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency.

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(6) Any plan, program, project, or activity that occurs, in whole or in part, in the Delta, if both of the following conditions are met:

(A) The plan, program, project, or activity is undertaken by a local public agency that is located, in whole or in part, in the Delta.

(B) Either a notice of determination is filed, pursuant to Section 21152 of the Public Resources Code, for the plan, program, project, or activity by, or the plan, program, project, or activity is fully permitted by, September 30, 2009.

(7) (A) Any project within the secondary zone, as defined pursuant to Section 29731 of Public Resources Code as of January 1, 2009, for which a notice of approval or determination pursuant to Section 21152 of the Public Resources Code has been filed before the date on which the Delta Plan becomes effective.

(B) Any project for which a notice of approval or determination is filed on or after the date on which the final Bay Delta Conservation Plan becomes effective, and before the date on which the Delta Plan becomes effective, is not a covered action but shall be consistent with the Bay Delta Conservation Plan.

(C) Subparagraphs (A) and (B) do not apply to either of the following:

1. Any project that is within a Restoration Opportunity Area as shown in Figure 3.1 of Chapter 3: Draft Conservation Strategy of the Bay Delta Conservation Plan, August 3, 2009, or as shown in a final Bay Delta Conservation Plan.

2. Any project that is within the alignment of a conveyance facility as shown in Figures 1 to 5, inclusive, of the Final Draft Initial Assessment of Dual Delta Water Conveyance Report, April 23, 2008, and in future revisions of this document by the department.

(8) A “ministerial” project under the California Environmental Quality Act, as defined by CEQA Guidelines Section 15369.

(9) An “emergency” project under the California Environmental Quality Act, as defined in Public Resources Code Section 21080(b)(2)-(4).

(10) Temporary water transfers of up to one year in duration.

(c) Nothing in the application of the definition of a “covered action” shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Section 85057.5, Water Code.

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Article 2. Certifications of Consistency

§ 5003. Contents of Certifications of Consistency.

Certifications of Consistency with the Delta Plan shall contain detailed findings of the following:

- (a) The covered action's consistency with the coequal goals, the inherent objectives, and each of the sections in this chapter, commencing with Section 5005, implicated by the covered action. When, due to the nature of the covered action, consistency with all relevant sections is not feasible, a covered action proponent shall clearly identify areas where consistency is not feasible, explain the reasons, and describe how the covered action nevertheless, on the whole, is consistent with the coequal goals and the inherent objectives;
- (b) All potentially significant adverse environmental impacts due to the covered action and feasible mitigations of those adverse impacts;
- (c) As relevant to the purpose and nature of the project, provide documentation of the use of best available science, as described in Chapter 2 of the Delta Plan;
- (d) A certification that the covered action shall comply at all times with existing applicable law; and,
- (e) Ecosystem restoration and water management covered actions shall include adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management consistent with the Delta Plan. This requirement shall be satisfied through:
 - (1) an adaptive management plan that describes the approach to be taken for each of the nine steps of the adaptive management framework as defined in Chapter 2 of the Delta Plan; and,
 - (2) documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.

NOTE: Authority cited: Sections 85210(i), Water Code.

Reference: Sections 85225, 85020, 85054 and 85308, Water Code.

Article 3. Delta Plan.

§ 5004. Application to Covered Actions.

Sections 5005 through 5016 of this Chapter apply only to covered actions, as defined by Water Code Section 85057.5 and Section 5002 of this Chapter.

NOTE: Authority cited: Sections 85210(i), Water Code.

Reference: Sections 85057.5, Water Code.

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§ 5005. Reduce Reliance on the Delta through Improved Regional Water Self-Reliance.

A covered action to export water from, transfer water through, or use water in the Delta is inconsistent with the Delta Plan if the covered action negatively impacts one or more of the coequal goals and one or more of the water suppliers that receive water from the Delta significantly causes the need for the covered action by failing to comply with one or more of the following:

(a) Existing State Law regarding Water Management Planning.

(1) Urban water suppliers shall:

(A) adopt and implement an Urban Water Management Plan and all required elements and measures, meeting the standards and timelines established in Water Code section 10610 et seq.; and,

(B) adopt and implement a plan to achieve 20 percent reduction in statewide urban per capita water use by December 31, 2020, meeting the standards and timelines established in Water Code section 10608 et seq.

(2) Agricultural water suppliers shall:

(A) adopt and implement Agricultural Efficient Water Management Practices including measurement of the volume of water delivered to customers, adoption of a pricing structure based in part on the quantity delivered, and implementation of specific conservation measures that are locally cost effective and technically feasible, meeting the standards and timelines established in Water Code section 10608 et seq.; and,

(B) adopt and implement an Agricultural Water Management Plan and all required elements, meeting the standards and timelines established in Water Code section 10800 et seq.

(b) Inclusion of Water Supply Reliability Element in Water Management Plans.

(1) Water suppliers shall, no later than December 31, 2015, expand an existing or add a new Water Reliability Element in their Urban Water Management Plan and/or Agricultural Water Management Plan. Water suppliers may also meet this requirement by including a Water Supply Reliability Element in an approved Integrated Regional Water Management Plan or other water plan that provides equivalent information.

(2) The Water Supply Reliability Element shall detail how water suppliers are sustaining and improving regional self-reliance and reducing reliance on the Delta through investments in local and regional programs and projects, and shall document actual or projected reduction in reliance on Delta exports. At a minimum, the Water Supply Reliability Element shall include:

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(A) A plan for possible interruption of Delta water supply due to catastrophic events. The Water Supply Reliability Element shall identify how reliable water service will be provided or shortages managed for minimum periods of 6 months, 18 months, and 36 months in the event that diversions or exports from the Delta are interrupted during an average water year, dry water year, and following three consecutive dry water years.

(B) Implementation of planned investments in water conservation, water efficiency, and water supply development. The Water Supply Reliability Element shall identify specific programs and projects that will be implemented over a 20-year planning period and how they are consistent with the coequal goals and will contribute to improved regional self-reliance and reduced reliance on the Delta, including, but not limited to, the following strategies:

- (i) water conservation;
 - (ii) water use efficiency;
 - (iii) local groundwater and surface storage;
 - (iv) conjunctive use programs;
 - (v) water transfers;
 - (vi) water recycling;
 - (vii) treatment and use of currently non-potable groundwater;
 - (viii) stormwater capture and recharge; and,
 - (ix) saline water and brackish water desalination.
- (x) The Department of Water Resources has identified 27 “resource management strategies” that water suppliers should consider as investments in water conservation, water efficiency, and water supply development.

(C) Evaluation of regional water balance. The Water Supply Reliability Element shall provide an assessment of the long-term sustainability for the water supplies available to meet projected demands within the supplier’s hydrological region, as defined by California Water Plan 2009 Update, over the 20-year planning period. If the region’s demand exceeds available supplies, the Water Reliability Element shall identify the steps being taken through one or more of the Integrated Regional Water Management Plans to bring the region into long-term balance. If the region’s demands exceed available supplies and it does not have an Integrated Regional Water Management Plan or the Plan does not address the steps being taken to bring the region into balance, the Water Reliability Element shall describe how the supplier’s programs and projects are helping to bring the region into long term balance.

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(i) The purpose of a water balance is to provide and accounting of all water that enters and leaves a specific hydrologic region, how it is used, and how it is exchanged between regions. A water balance can be used to compare how water supplies and uses in a region can vary among wet, average, and dry hydrologic conditions and how each region's water balance compares with other regions and with the State's water balance. This is important to all water planning activities and provides a basis for evaluating unsustainable water management practices and making appropriate improvements.

(D) Evaluation of conservation-oriented water rate structure. The Water Reliability Element shall evaluate the degree to which the water supplier's current rate structure sustainably encourages and supports water conservation.

(c) Implementation of a Conservation-Oriented Rate Structure.

(1) Water suppliers shall, by December 31, 2020, develop and implement a conservation-oriented rate structure, which may include consideration of a water-budget-based rate structure that sustainably encourages and supports more efficient water use without causing a shortfall in system revenues.

(2) A sustainable conservation-oriented rate structure has the following characteristics:

(A) encourages more efficient water use without causing a shortfall in system revenue;

(B) provides for the identification of waste;

(C) rewards efficient use;

(D) penalizes excessive use;

(E) produces revenues from penalty rates that are used to fund conservation programs;

(F) is supported by a water bill that clearly communicates the cost of wasted water to the responsible person; and,

(G) is supported by a person or staff who can respond to customers' calls for help in reducing usage.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 10608, 10610, 85300, 85302, 85303 and 85305, Water Code.

§ 5006. Improved Transparency in the Development of Water Contracts.

Any new contract, contract modification, contract renewal or agreement to export water from, transfer water through, or use water in the Delta, except a transfer for up to one year in length, is inconsistent with the Delta Plan unless the contract, modification, renewal, or agreement has been developed in a transparent manner consistent with the Department of Water Resources' revised policies adopted in

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2003 for contract renewals and permanent transfers, attached as Appendix C to the Delta Plan and hereby incorporated by reference as if fully set forth in this subchapter, or comparable policies issued by the Bureau of Reclamation.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300 and 85302, Water Code.

§ 5007. Flow Standards for Purposes of the Delta Plan.

Covered actions shall comply with the flow objectives contained in the 2006 Bay-Delta Water Quality Control Plan, which plan is hereby incorporated by reference as if fully set forth herein, until those flow objectives are updated. When those objectives are updated by the State Water Resources Control Board, covered actions shall comply with the updated flow objectives.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300 and 85302, Water Code.

§ 5008. Habitat Restoration Actions.

Covered actions involving habitat restoration shall be consistent with the habitat type locations shown on the elevation map in Figure 5-2, and the accompanying text, in Appendix D of the Delta Plan, which is hereby incorporated by reference as if fully set forth herein.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300 and 85302, Water Code.

§ 5009. Other Actions Affecting Habitat.

Covered actions involving actions other than habitat restoration, including new or amended local or regional land use plans, shall avoid or mitigate within the Delta the adverse impacts to the opportunity for habitat restoration at the elevations shown in Figure 5-2 in Appendix D of the Delta Plan. Project proponents shall consult with the Department of Fish and Game in determining consistency with this section. This section does not apply within the following areas, defined as of January 1, 2012:

(a) Incorporated cities and their spheres of influence;

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(b) The Clarksburg Growth Boundary, as defined in the Yolo County 2030 Countywide General Plan adopted November 10, 2009;

(c) The Contra Costa County Urban Limit Line, as defined in the Contra Costa County General Plan 2005-2020 amended November 7, 2006; and,

(d) The Mountain House General Plan Community Boundary, as depicted on the Mountain House Master Specific Plan Map.

(e) The Yolo County 2030 Countywide General Plan adopted November 10, 2009, Contra Costa County General Plan 2005-2020 amended November 7, 2006, and the Mountain House Master Specific Plan Map are each hereby incorporated by reference as if fully set forth herein.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300, 85302 and 85305, Water Code.

§ 5010. Levees.

Covered actions involving the construction of new levees, or the substantial rehabilitation or reconstruction of existing levees in the Delta shall evaluate, and, where feasible, incorporate alternatives (including the use of setback levees) that would increase the extent of floodplain and riparian habitats.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300, 85302 and 85305, Water Code.

§ 5011. Nonnative Species Considered.

Covered actions shall fully consider, and avoid or mitigate the potential for new introductions of or improved habitat conditions for nonnative species in a way that appropriately protects the ecosystem.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300 and 85302, Water Code.

§ 5012. Floodway Protection.

Subject to Section 5014, covered actions shall not encroach upon or diminish floodways without mitigating for future flood flows.

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(a) As described in the Department of Water Resources' "Interim Levee Design Criteria for Urban and Urbanizing Areas in the Sacramento-San Joaquin Valley," which is hereby incorporated by reference as if fully set forth herein, encroachments and vegetation should be evaluated and managed so as to not impact levee safety, while recognizing their benefits.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300, 85302 and 85305, Water Code.

§ 5013. Floodplain Protection.

Subject to Section 5014, covered actions shall not encroach upon the following areas because they are critical floodplains and may also provide ecosystem benefit:

(a) Areas located in the Yolo Bypass from Fremont Weir through Cache Slough to the Sacramento River including the confluence of Putah Creek into the bypass;

(b) The Consumnes River-Mokelumne River Confluence, as defined by the North Delta Flood Control and Ecosystem Restoration Project (McCormack-Williamson), or as modified in the future by the Department of Water Resources or the U.S. Army Corps of Engineers;

(c) The Lower San Joaquin River Floodplain Bypass as described in the Lower San Joaquin River Floodplain Bypass Proposal, submitted to the Department of Water Resources by the partnership of the South Delta Water Agency, the River Islands Development Company, Reclamation District 2062, San Joaquin Resource Conservation District, American Rivers, the American Lands Conservancy, and the Natural Resources Defense Council in March 2011, and as such area may be modified in the future through the completion of the project.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300, 85302 and 85305, Water Code.

§ 5014. Insignificant Decreases in Existing Flood Protection Exempted.

Sections 5011 and 5012 do not apply to ecosystem restoration projects or ongoing agricultural or flood management activities unless they significantly decrease the existing level of flood protection.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300 and 85305, Water Code.

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§ 5015. Levee Classifications for Protection of Land and Resource Uses.

Covered actions involving land and resource uses shall be consistent with Table 7-1 of the Delta Plan, attached as Appendix __ hereto.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300, 85305 and 85306, Water Code.

§ 5016. Directing State Investments for Levee Operation, Maintenance, and Improvements in the Delta.

Covered actions involving state investments for levee operation, maintenance and improvements shall be consistent with Guidelines for the Delta Levee Special Flood Control Projects and Subventions Programs adopted by the Department of Water Resources in February 2010, and incorporated herein by reference. If, by January 1, 2012, the Department of Water Resources, in consultation with the Central Valley Flood Board and the Delta Stewardship Council, has completed its "Framework for Department of Water Resources Investments in Delta Integrated Flood Management", the Delta Stewardship Council shall consider its adoption and incorporation for purposes of this section. If this Framework is not completed by January 1, 2013, the Delta Stewardship Council shall adopt and incorporate a strategy directing state investments for purposes of this section.

NOTE: Authority cited: Section 85210(i), Water Code.

Reference: Sections 85300, 85305 and 85306, Water Code.

§ 5017. Just Compensation.

The provisions in this Chapter are not intended and shall not be construed as authorizing the Delta Stewardship Council or any entity to exercise its power in a manner that will take or damage private property for public use without the payment of just compensation.

NOTE: Authority cited: Section 85210(i), Water Code.

§ 5018. Property Owner Rights.

The provisions in this Chapter are not intended to affect the rights of any owner of property under the Constitution of the State of California or the United States.

NOTE: Authority cited: Section 85210(i), Water Code.

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§ 5019. No Increase in State's Flood Liability.

The provisions in this Chapter shall not increase the State's flood liability.

NOTE: Authority cited: Sections 85032(j) and 85210(i), Water Code.

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